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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

JOEL O. RANDALL,
Petitioner,
vs.
STATE OF GEORGIA.

No. 263

PETITION FOR WRIT OF CERTIORARI
To the Court of Appeals of Georgia
and
BRIEF IN SUPPORT THEREOF.

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Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

JOEL O. RANDALL,
Petitioner,
vs.
STATE OF GEORGIA.
No. .....

PETITION FOR WRIT OF CERTIORARI

The petitioner, Joel O. Randall, respectfully shows to this Honorable Court:

A.

1. Your petitioner is a citizen of the United States and of the State of Georgia. He was indicted by the Grand Jury of Fulton County, State of Georgia, on the 28 day of November, 1944. The indictment contained one count charging robbery, with an additional allegation charging petitioner under the second offender statute of the State of Georgia (Record pages 5-6).

There was conflict in the evidence as to whether the defendant committed the robbery. The defendant introduced in evidence testimony of many witnesses from

Montgomery, Alabama, Selma, Alabama, and Meridian, Mississippi, tending to establish an alibi. If the testimony of these witnesses is to be believed this petitioner could not have been at the scene of the robbery at the time the robbery occurred. The State introduced the testimony of the employees of the theatre tending to identify the petitioner as the robber. These employees of the theatre were not positive and unequivocal in their identification of the petitioner as the robber. Their opportunity to observe the robber was so limited in point of time, and the circumstances as to the robber's concealment of his person was such as to render their opinion with regard to his identity unreliable. They testified that they only observed the robber for a few seconds before they were ordered to turn their backs and face the wall; that the robber had the hair of his head and his forehead covered by wearing a cap with a long bill which shielded all of his forehead down to a point just immediately above his eyebrows; that he had a cloth over his nose with a hole cut through the cloth for him to breathe through, which covered all of his nose and covered all of his cheeks to a point immediately below his lower eyelids and was tucked in to the cap in such manner as to conceal all the hair on his head and all the side of his forehead; the only other part of the person of the robber seen by them was his hands; there was testimony that some of these witnesses had tentatively identified other persons as being the robber before they identified this petitioner. The Court permitted introduction of testimony of acts and conduct of an alleged fellow conspirator (not indicted), Barney Berry, without any testimony to establish prima facie the relation of co-conspirator between your petitioner and the said Barney Berry. The testimony with relation to the acts and conduct and declarations of this Barney Berry related to incidents both before and subsequent to the commission of

the robbery; there was no testimony that Barney Berry was in the vicinity of the theatre robbed nor that he was even in the City of Atlanta or County of Fulton on the day or night of the robbery. There was no testimony of any association or communication between petitioner and Barney Berry before the robbery, or for a week afterward.

The Court permitted a demonstration in the presence of the Jury of the manner and method of using a preparation called "Zip," for removing hair. It appeared at the trial that the defendant had very little hair on his hands. The hair which was upon his hands was thin and while of ordinary length was of a light color and very fine and scarcely observable.

With relation to the allegation in the indictment charging the petitioner as a second offender, the petitioner offered in evidence a pardon from the Governor of the State of Georgia upon the theory that the pardon obliterated the former offense; that in the eye of the law a conviction is obliterated by a pardon and cannot subsequent to the pardon serve to put the petitioner under any penalty such as the second offender law provides. This pardon when offered in evidence was excluded.

The petitioner, as was his right under the Law of the State of Georgia, made a statement to the Jury and in the course of his statement said:

> "I would like to say that on the 8th day of May, 1935, I was convicted of a crime in Macon, Georgia, and in February 1939, another man confessed to that crime and exonerated me from any part in it. That investigation was made by the Trial Judge Hon. W. A. McClellan, by the Chief of Police at Macon, Mr. Ben E. Watkins, and by the Solicitor General of the Macon District, Mr. Garrett, and was also investigated by Mr. Boykin's office of this County by Mr. Perryman, and I have since that time received a pardon from the

State of Georgia for that crime. The man who confessed to that crime was Louis Head" (Record page 153).

After the Court had orally instructed the jury, the jury retired at 12:40 P. M. The jury returned at 1:35 P. M. and requested further instructions of the Court, the proceedings in that respect being as follows:

"Foreman: The question arises among us as to the indictment being placed in evidence for consideration, with the understanding that we were to leave out the last part—that the defendant had a pardon. Some have requested that it be shown if that is true."

"The Court: I have instructed you fully on the question of guilt or innocence—you should not consider or give any note whatever to the alleged conviction in Bibb County in 1935. You will determine the question of guilt or innocence without reference to that. There is no evidence in this case of a pardon, and I instruct you to disregard that matt altogether in determining the issues in this case."

"Foreman: The defendant stated that there was a pardon."

"The Court: I told you there was no evidence in the case of a pardon. You have the right to consider the defendant's statement under the circumstances that I have previously outlined to you. I will reiterate my statement not to consider that indictment on the question of guilt or innocence, and I instruct you that if you find a verdict of guilty in this case that it would be your duty to fix the penalty at twenty to twenty years" (Record page 200).

Thereafter the jury returned a verdict of guilty fixing the defendant's punishment at twenty years.

Under the rules of practice of the Georgia Courts, defendant is not required to reserve an exception to the Court's oral charge to preserve his right to review the same for error.

2. Appeal was duly perfected to the Court of Appeals of the State of Georgia.

Judgment was rendered affirming the judgment of the Court below by the Court of Appeals of Georgia on the 30th day of November, 1945 (36 S. E. Rep. [2d] 450), (Record pages 266-295).

Thereafter this petitioner filed his application for rehearing in the Court of Appeals of Georgia which said application for rehearing was overruled and denied on December 19, 1945 (Record pages 297-300), and thereafter this petitioner filed his second application for a rehearing which second application for a rehearing was overruled and denied by the Court of Appeals of Georgia on the 20th day of December, 1945 (Record page 317).

And thereafter within the time prescribed by law and the rules of the Court, your petitioner did file his application to the Supreme Court of Georgia for a Writ of Certiorari to review and revise the aforesaid judgment of the Court of Appeals of Georgia which said application for Writ of Certiorari was by the Supreme Court of Georgia denied on April 4, 1946.

No opinion was written by the Supreme Court of Georgia on petitioner's application for Writ of Certiorari, nor was any opinion written by the Court of Appeals of Georgia on either of the applications for rehearing.

Notice of intention to apply to the Supreme Court of the United States for review and application for stay of execution was filed in the Court of Appeals of Georgia on the 5th day of June, 1946, and was by the Court granted, and execution of sentence stayed pending final disposition of this cause by the Supreme Court of the United States upon application of Writ of Certiorari timely filed by this petitioner.

B.

STATEMENT OF THE JURISDICTION.

1. This Court has jurisdiction to grant the relief prayed because this is a case wherein there is presented a question as to the denial by the Courts of the State of Georgia to this petitioner of due process of law guaranteed to him under the due process clause of the Fourteenth amendment to the Constitution of the United States, which denial of due process occurred in each of the following separate and several particulars:

A. The defendant on trial for a felony was denied the right of a trial by jury according to the established judicial procedure of the State of Georgia guaranteed to him by the Constitution of the State of Georgia, the statutes of the State of Georgia, and judicial decisions of the Courts of last resort of the State of Georgia.

B. The defendant on trial for a felony was denied the right to have the credibility of his statement to the jury submitted to the jury contrary to established judicial procedure in the State of Georgia guaranteed to defendants on trial in Criminal cases by the Statute of the State of Georgia and the judicial decisions of the Courts of last resort in the State of Georgia.

C. The defendant on trial for a felony was denied the right to have the credibility of the evidence against him with regard to a former conviction alleged in the indictment submitted to the jury, contrary to established judicial procedure in the State of Georgia guaranteed to defendants on trial by the statutes of the State of Georgia and judicial decisions of the Courts of last resort of the State of Georgia.

D. The defendant on trial for a felony was denied the right to have the benefit of a vested right conferred upon

him by a pardon duly issued by the Governor of the State of Georgia removing disabilities of a former conviction by a ruling of the Court denying him the privilege of introducing said pardon in evidence and was thereby deprived of his life, liberty or property contrary to the guarantees contained in the due process clause of the Fourteenth amendment.

E. The defendant on trial for a felony, being charged as a second offender, was denied the right to introduce in evidence a pardon which legally absolved him from all disabilities resulting from the former conviction alleged in the indictment and subjected to the disability imposed upon second offenders by a statute of the law of Georgia contrary to due process of law.

F. The Court of Appeals of Georgia has rendered a decision adjudicating a revocation of a pardon duly issued by the Governor of the State of Georgia without this petitioner having been granted the right to a hearing thereupon, thereby subjecting him to the necessity of serving a sentence in the Georgia penitentiary for which he had been pardoned by the Governor of the State of Georgia, depriving him of his liberty contrary to the due process clause of the Fourteenth amendment.

The decision of the Court of Appeals of the State of Georgia, that being the highest Court of the State of Georgia to which this defendant could appeal as a matter of right, being adverse to his aforesaid contentions, in itself amounts to a denial by the Georgia Court of Appeals of the right to due process of law guaranteed by the Fourteenth amendment to the Federal Constitution and if permitted to be enforced will deprive the defendant of his liberty, without due process of law contrary to the guarantee contained in the due process clause of the Fourteenth amendment to the Federal Constitution.

2. The Act of Congress of February 12, 1925, Section 247B, 28 U. S. C. A. subdivision (b) 344, authorizes review by the Supreme Court of the United States by Writ of Certiorari:

> "Where any title, right, privilege or immunity is especially set up or claimed by either party under the Constitution."

In that this petitioner did claim the right to introduce in evidence his pardon and did object in each and every particular instance where evidence of an inflammatory and prejudicial nature was offered against him and did present to the Court of Appeals of Georgia, his claim of right under the due process clause of the Federal Constitution that his trial had been conducted in violation of the guarantee of the due process clause of the Federal Constitution and the Court of Appeals of the State of Georgia ruled adversely to your petitioner and affirmed the judgment.

3. The judgment which this petitioner prays this Court to review was rendered by the Court of Appeals of Georgia, on the 30th day of November 1945, and is reported in 36 S. E. Rep. (2nd), at page 450 (Record page 296).

Application to the Court of Appeals for rehearing was duly and timely filed on the 10th day of December 1945, and was denied and overruled by the Court of Appeals of Georgia on the 19th day of December 1945, (Record page 300); second application for rehearing was filed in the Court of Appeals of Georgia and was by the Court of Appeals of Georgia denied and overruled on the 20th day of December, 1945 (Record page 317).

Petition to the Supreme Court of Georgia for a Writ of Certiorari to the Court of Appeals of Georgia was filed by this petitioner on the 19th day of January, 1946 (Record page 319). The Supreme Court of Georgia denied

petitioner's application for a Writ of Certiorari without an opinion on the 4th day of April 1946 (Record page 320).

Notice of intention to apply to the Supreme Court of the United States for review and application for stay of execution was filed in the Court of Appeals of Georgia on June 5, 1946, and was by the Court granted, and execution of sentence stayed pending final disposition of this cause by the Supreme Court of the United States upon application for Writ of Certiorari timely filed by petitioner (Record pages 321-325).

4. The Constitutional questions here raised are serious and not frivolous. They involve the right of a defendant charged with a felony to a jury trial; to a fair and impartial trial; to be protected in a right vested in him by a pardon granted by the Governor of the State of Georgia pursuant to his Constitutional prerogative.

And it is the purpose of the petitioner to show the Court that it is a denial of due process of law for a trial Court in the State of Georgia to direct a verdict against a defendant upon the issue of fact made by the allegation in the indictment charging a felony that the defendant has theretofore been convicted of a felony; that it is a denial of due process of law for a Court to deny to a defendant the immunities and benefits vested in him pursuant to a pardon duly issued by the Governor of the State of Georgia pursuant to his constitutional prerogative; and that it is a denial of due process of law for a Court to permit a trial to be conducted in an atmosphere calculated to create such inflamed passions and prejudices generated by illegal evidence of an inflammatory and prejudicial nature that it amounts to a denial of that fair and impartial trial which is an essential element of the due process of law as that term is used in the Federal Constitution.

C.

THE QUESTIONS PRESENTED.

1. (a) The Court of Appeals of Georgia has by its decision, affirmed a judgment of conviction in a felony case fixing punishment at twenty years in the penitentiary of the state of Georgia, rendered as the product of a trial in which this petitioner was denied the benefit of due process of law in that:

Petitioner was denied the right of a trial by jury in the several particular ways set forth in subdivisions A, B, C, D, E and F of paragraph 1, section B of this petition; the defendant was denied the right to introduce in evidence a pardon contrary to established judicial proceedings and the law of the land prevailing in the State of Georgia, particularly set forth in paragraph E of section 1, subdivision B, hereinbefore set forth; the defendant had been subjected to the necessity of serving the unexpired portion of a sentence based upon conviction for which he had received the Governor's pardon by virtue of that decision of the Court of Appeals of Georgia judicially revoking said pardon without petitioner having been granted the right to have a hearing thereupon in the particular way set forth in subparagraph F, paragraph 1, section B of this petition.

The decision of the Court of Appeals of the State of Georgia here sought to be reviewed, that being the highest Court of the State of Georgia to which this petitioner could appeal, as a matter of right, denied the petitioner the benefits of the rights, privileges and immunities guaranteed to him by the due process clause of the Fourteenth Amendment, in that it affirmed and held to be free of error the infringements upon his constitutional right to due process of law as hereinbefore set forth.

A copy of the entire record in this case, certified to be

correct by the Clerk of the Court of Appeals of the State of Georgia, is hereby furnished, attached to, and made a part of this application in compliance with Rule 38, Par. 1, of the Rules of this Court.

(b) The Court of Appeals of Georgia has decided Federal questions of substance not heretofore determined by this Court, or has decided them in a way not in accord with the applicable decisions of this Court.

(c) The Court of Appeals of Georgia by its decision in this case has denied to this petitioner rights guaranteed to him by the Fourteenth Amendment to the Federal Constitution, namely, the rights, privileges and immunities hereinbefore detailed in sub-paragraph (a) of paragraph 1 of section C of this petition.

(d) And your petitioner says that he is not guilty as charged upon the indictment upon which he was tried in the Superior Court of Fulton County, Georgia, and that he verily believes that but for the violation of the constitutional rights, privileges and immunities hereinbefore set forth, the result of the trial in the Court below would have been favorable to him; and that the verdict as rendered against this petitioner is the product of a trial wherein his rights were prejudiced by the erroneous conduct of the trial as hereinbefore set forth in violation of his rights as a citizen of the United States guaranteed to him by the aforementioned provisions of the Constitution of the United States.

D.

PRAYER FOR THE WRIT.

Whereas your petitioner doth pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals of Georgia, commanding that Court to certify and send to this Court

for a review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the cause numbered and titled Docket No. 30918, Joel O. Randall v. State of Georgia, and that the judgment of the Court of Appeals of Georgia may be reviewed by this Honorable Court and that your petitioner may have such other and further relief in the premises as unto this Honorable Court may seem meet and just; and your petitioner will ever pray.

JOEL O. RANDALL,

By.....
G. ERNEST JONES,
Counsel for Petitioner.

RODERICK BEDDOW,
Of Birmingham, Alabama,
MARVIN O'NEAL, JR.,
Of Atlanta, Georgia,
Of Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

JOEL O. RANDALL,
Petitioner,
vs.
STATE OF GEORGIA.
No. .....

BRIEF AND ARGUMENT OF PETITIONER

In Support of Petition for Writ of Certiorari.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the Court of Appeals of Georgia was rendered by the Court of Appeals of Georgia on the 30th day of November 1945, and is reported in 36 Southeastern Reporter (2nd) at page 450 (Record pages 266-295). For the sake of brevity it is not reprinted as an appendix to this brief.

II.

JURISDICTION.

1. Statutory jurisdiction for this petition is founded upon the provisions of Act of Congress of February 13, 1925, section 247B, 28 U. S. C. A., subdiv. (b), section 344,

pages 205-206; the petition is timely filed pursuant to the provisions of section 350, title 28, U. S. C. A., page 376.

2. The date of the judgment of the Court of Appeals of Georgia is November 30, 1945; Ceriorari was denied by the Supreme Court of Georgia (without opinion) on April 4, 1946.

3. The nature of this case and the rulings below bring this case within the judicial provision of title 28, section 344 (b), U. S. C. A., supra. Claim of right guaranteed by the Federal Constitution was presented by assignments of error on appeal to the Court of Appeals of Georgia, and was there insisted upon in brief and argument, which brief and argument does not appear of record in the cause. The Federal right claimed separately by this petitioner is that his rights guaranteed by the Fourteenth amendment to the Federal Constitution were infringed upon in the course of the trial in that:

A. The defendant on trial for a felony was denied the right of a trial by jury according to the established judicial procedure of the State of Georgia guaranteed to him by the Constitution of the State of Georgia, the Statutes of the State of Georgia, and the judicial decisions of the Courts of last resort of the State of Georgia.

B. The defendant on trial for a felony was denied the right to have the credibility of his statement to the jury submitted to the jury contrary to established judicial procedure in the State of Georgia guaranteed to defendants on trial in Criminal cases by the Statutes of the State of Georgia and the judicial decisions of the Courts of last resort in the State of Georgia.

C. The defendant on trial for a felony was denied the right to have the credibility of the evidence against him with regard to a former conviction alleged in the indictment submitted to the jury, contrary to established judi-

cial procedure in the State of Georgia guaranteed to defendants on trial by the Statutes of the State of Georgia and judicial decisions of the Courts of last resort of the State of Georgia.

D. The defendant on trial for a felony was denied the right to have the benefit of a vested right conferred upon him by a pardon duly issued by the Governor of the State of Georgia removing disabilities of a former conviction by a ruling of the Court denying him the privilege of introducing said pardon in evidence and thereby deprived him of his life, liberty or property contrary to the guarantees contained in the due process clause of the Fourteenth amendment.

E. The defendant on trial for a felony, being charged as a second offender, was denied the right to introduce in evidence a pardon which legally absolved him from all disabilities resulting from the former conviction alleged in the indictment and subjected to the disability imposed upon second offenders by a Statute of the law of Georgia contrary to due process of law.

F. The Court of Appeals of Georgia has rendered a decision adjudicating a revocation of a pardon duly issued by the Governor of the State of Georgia without this petitioner having been granted the right to a hearing thereupon, thereby subjecting him to the necessity of serving a sentence in the Georgia penitentiary for which he had been pardoned by the Governor of the State of Georgia, depriving him of his liberty contrary to the due process clause of the Fourteenth Amendment.

III.

STATEMENT OF THE CASE.

Petitioner was indicted upon a charge of robbery as defined by section 26-2503, the Code of Georgia (1933), which reads as follows:

> "robbery by intimidation or without using force and violence shall be punished by imprisonment and labor in the penitentiary for not less than two years nor more than twenty years."

The indictment also charged the petitioner as a second offender under section 27-2511 of the Code of Georgia (1933), which reads as follows:

> "If any person who has been convicted of an offense and sentenced to confinement and labor in the penitentiary shall afterwards commit a crime punishable by confinement and labor in the penitentiary, he shall be sentenced to undergo the longest period of time and labor prescribed for the punishment of the offense of which he stands convicted."

Also involved in a consideration of this case is the statute of the State of Georgia providing that a defendant in a felony case may make an unsworn statement to the jury, which statement is to be given such weight and consideration by the jury as the jury may in the exercise of their sound discretion see fit to accord thereto. This Code section reads as follows:

> "In all Criminal trials, the prisoner shall have the right to make to the Court and jury such statement in the case as he may deem proper in his defense. It shall not be under oath, and shall have such force only as the jury may think right to give it. They may believe it in preference to the sworn testimony in the case. The defendant shall not be compelled to answer

any question on cross examination, should he think proper to decline to answer."

Code of Ga. (1933), section 38-415.

Petitioner in this case earnestly insists that he was not guilty of the offense with which he was charged; he insists that there has been a tragic mistake made by the Courts and the jury; that he was not in the State of Georgia at the time the robbery for which he was tried was committed. To sustain his alibi he brought the testimony of persons affirmatively shown to have no interest in the case, or in the defendant, and to be of the highest type and character. Each of these witnesses were especially investigated by a representative of the Fulton County prosecuting attorney's office, yet not the shadow of blemish to their character was shown. These witnesses had full opportunity of knowledge of the facts with regard to which they testified and were positive and unequivocal in their testimony. The gist of the State's testimony identifying petitioner as the robber, was testimony by the theatre employees to the effect that the robber knocked upon the door of the private office of the manager of the theatre; when accorded entrance, he entered with a pistol pointed at the employees and immediately ordered them to turn their faces to the wall, and backs to the robber; that the robber was dressed in clothes which they were unable to describe as to color, etc.; that the robber was wearing a cap which completely covered his hair with a "bill" (or visor) which came down and obscured his forehead to a point approximately next to a line across his forehead just above the eyebrows; that he wore a white cloth mask with a hole so placed that a part of his nose protruded, permitting him to breathe, and covering his nose, his entire face and the sides of his head from a point just below his lower eyelid and the bridge of his nose to the

front part of his temples, which cloth was tucked into his cap so that no part of the hair on his head and no part of his face could be seen except the point of his nose and the eyebrows and eyes; the opportunity of observation on the part of these witnesses was so slight as to render their opinion of the identity of the robber, whom none of them claimed to have ever known or seen or to have heard speak before, constituted evidence of such slight reliability as to be scarcely a scintilla sufficient to go to the jury.

Over objection of defendant, much testimony was permitted to be introduced with regard to the activities of a well known and publicized underworld character by the name of Barney Berry both before and after the time of robbery. Yet there was no evidence in the case that Barney Berry was at or near the scene of the robbery, in or about the Paramount theatre on the day of the robbery or even in the City of Atlanta at or before the time of the robbery during the recent period before the robbery; or that Barney Berry and Joel Randall had ever had any sort of contact or acquaintance direct or indirect prior to the time of the robbery. Acts and declarations of this Barney Berry before the time of the robbery, none of which tended to connect this petitioner with Barney Berry, were permitted to be introduced in evidence over strenuous objection of this petitioner. Acts and declarations of Barney Berry not in the presence or hearing of this defendant subsequent to the robbery, were permitted to be introduced though none tended either directly or indirectly to connect this defendant with the robbery; the Court then submitted the issue of conspiracy to the jury though no evidence tending to establish conspiracy had been produced. Inflammatory, prejudicial testimony was permitted with regard to this petitioner's arrest on a charge of violating O. P. A. regulations at Columbus, Georgia, a week subsequent to the time of robbery and the Court even permitted the introduction of a thirty-two Colt revolver found in the automobile occu-

pied by petitioner and Barney Berry at the time of the arrest in Columbus, Georgia; the Court also permitted introduction of a conversation, while both were under arrest, between the arresting officer and Barney Berry, wherein the officer told Barney Berry that he was holding him upon a charge of robbery, notwithstanding the officer testified that he did not have any request or complaint against Joel Randall at that time, and stated to Joel Randall that he would hold him on a charge of having a pistol; the truth was that both were arrested for violation of an O. P. A. regulation with regard to Gasoline coupons and both were so charged in the Federal Courts. The Court below even went so far as to permit an introduction of a picture of Barney Berry. In this connection it must be observed that Barney Berry was never charged with any offense connected with the robbery for which this petitioner was charged and convicted. The Court below even went so far as to permit detailed evidence with regard to the title of the picture being shown on the screen of the Paramount theatre on the day of the robbery, the title being "Uninvited". The Court below permitted testimony with regard to an experiment conducted immediately before the trial by one C. E. Pressley in which he testified that he, an officer of the law, driving an official automobile, had driven from Montgomery, Alabama, to Atlanta, Georgia, after deducting time for stops in three hours and forty-five minutes, notwithstanding it did not appear that the automobile which he was driving was similar to the automobile owned and operated by petitioner and where undisputed testimony established the presence of the petitioner in the City of Montgomery at between 6:30 and 7:00 o'clock P. M. in an automobile which had a broken spring and established his presence in Montgomery, Alabama, the next morning with the same automobile, with the same broken spring. It also appeared that the experiment by the police officer was conducted in daytime whereas if the petitioner

had driven from Montgomery to Atlanta the trip would have necessarily been during the nighttime. The Court also permitted the introduction of testimony with regard to experiment with a preparation bearing the trade name of "Zip", a hair remover; there was not a single scintilla of evidence that this defendant had ever removed hair from the back of his hands. The fact was that upon observation of defendant, the hair upon back of his hands was thin and scattered, light blond in color, fine in texture and scarcely observable whereas each of the state's witnesses had testified that the robber had such a heavy growth of hair upon his hands that it attracted their attention and impressed itself upon their minds during the slight period they had opportunity to observe him, notwithstanding that the only witness who testified with respect to the condition of his hands while in the Columbus jail testified that she did not observe any excessive growth of hair on his hands.

In answer to that specific charge in the indictment charging this petitioner as a second offender, this petitioner offered in evidence a pardon together with the record evidence from the Governor's office upon which the pardon had been issued, which record established his innocence of the offense for which he had theretofore suffered a conviction. The whole proceedings with reference to the introduction of this testimony to which the Court sustained objection, were of a nature calculated to prejudice and inflame the minds of the jury against this defendant and petitioner contends that the denial to him of the right to have the benefit of the immunity from disabilities vested in him by virtue of said pardon constituted a denial of his constitutional rights pursuant to the terms of the Fourteenth amendment to the Federal Constitution.

Under the Georgia Statute the defendant has the right and privilege of making a statement to the jury which statement is to be considered by the jury and given such weight as the jury may see fit to accord thereto, even to

the point of believing the statement against sworn testimony of other witnesses. The petitioner availing himself of this right, made a statement to the jury and in the course of his statement to the jury said:

> "I would like to say that on the 8th day of May, 1935, I was convicted of a crime in Macon, Georgia, and in February 1939, another man confessed to that crime and exonerated me from any part in it. That investigation was made by the trial Judge Hon. W. A. McClellan, by the Chief of Police at Macon, Mr. Ben E. Watkins, and by the Solicitor General of the Macon District, Mr. Garrett, and was also investigated by Mr. Boykin's office of this County by Mr. Perryman, and I have since that time received a pardon from the State of Georgia for that crime. The man who confessed to that crime was Louis Head" (Record page 153).

After all the evidence had been adduced, and the Court had given its oral instructions to the jury, the jury retired and deliberated for about one hour and thereupon returned to the Court room and requested further instructions, the porceedings in that respect being as follows:

> "Foreman: The question arises among us as to the indictment being placed in evidence for consideration, with the understanding that we were to leave out the last part—that the defendant had a pardon. Some have requested that it be shown if that is true."
>
> "The Court: I have instructed you fully on the question of guilt or innocence—you should not consider or give any note whatever to the alleged conviction in Bibb County in 1935. You will determine the question of guilt or innocence, without reference to that. There is no evidence in this case of a pardon, and I instruct you to disregard that matter altogether in determining the issues in this case."
>
> "Foreman: The defendant stated that there was a pardon."

"The Court: I told you there was no evidence in the case of a pardon. You have the right to consider the defendant's statement under the circumstances that I have previously outlined to you. I will reiterate my statement not to consider that indictment on the question of guilt or innocence, and I instruct you that if you find a verdict of guilty in this case that it would be your duty to fix the penalty at twenty to twenty years" (Record page 200).

Thereafter the jury returned a verdict of guilty fixing this petitioner's punishment at twenty years in the State penitentiary.

Whereupon the petitioner filed his motion for new trial assigning some twenty six errors which was duly overruled and appeal taken to the Court of Appeals of Georgia.

While it is not apparent from reading the decision of the Georgia Court of Appeals that this petitioner claimed his rights under the Fourteenth amendment to the Federal Constitution, the Brief and argument filed on the appeal did claim the separate and several infringements of its rights which are here insisted upon. Under the rules of practice in the Georgia Courts, a party is not required to reserve an exception to the Court's instruction to the jury to claim the benefit of any erroneous instruction.

IV.

ERRORS ASSIGNED.

The Court of Appeals of the State of Georgia committed separate and several errors in affirming the separate and several rulings of the Court below wherein:

"A. The defendant on trial for a felony was denied the right of a trial by jury according to the established judicial procedure of the State of Georgia guaranteed to him by the Constitution of the State of Georgia, the Statutes of the State of Georgia, and the judicial decisions of the Courts of last resort of the State of Georgia."

"B. The defendant on trial for a felony was denied the right to have the credibility of his statement to the jury submitted to the jury contrary to established judicial procedure in the State of Georgia guaranteed to defendants on trial in Criminal cases by the Statute of the State of Georgia and the judicial decisions of the Courts of last resort in the State of Georgia."

"C. The defendant on trial for a felony was denied the right to have the credibility of the evidence against him with regard to a former conviction alleged in the indictment submitted to the jury, contrary to established judicial procedure in the State of Georgia guaranteed to defendants on trial by the Statutes of the State of Georgia and judicial decisions of the Courts of last resort of the State of Georgia."

"D. The defendant on trial for a felony was denied the right to have the benefit of a vested right conferred upon him by a pardon duly issued by the Governor of the State of Georgia removing disabilities of a former conviction by a ruling of the Court denying him the privilege of introducing said pardon in evidence and thereby deprived him of his life, liberty or property contrary to the guarantees contained in the due process clause of the Fourteenth amendment."

"E. The defendant on trial for a felony, being charged as a second offender, was denied the right to

introduce in evidence a pardon which legally absolved him from all disabilities resulting from the former conviction alleged in the indictment and subjected to the disability imposed upon second offenders by a Statute of the law of Georgia contrary to due process of law."

And the Court of Appeals of Georgia further erred in that particular wherein:

F. "it rendered a decision adjudicating a revocation of a pardon duly issued by the Governor of the State of Georgia without this petitioner having been granted the right to a hearing thereupon, thereby subjecting him to the necesisty of serving a sentence in the Georgia penitentiary for which he had been pardoned by the Governor of the State of Georgia, depriving him of his liberty contrary to the due process clause of the Fourteenth Amendment."

BRIEF AND ARGUMENT.

FIRST ASSIGNMENT OF ERROR.

"A. The defendant on trial for a felony was denied the right of a trial by jury according to the established judicial procedure of the State of Georgia guaranteed to him by the Constitution of the State of Georgia, the Statutes of the State of Georgia, and the judicial decisions of the Courts of last resort of the State of Georgia."

This assignment of error is predicated on that portion of the opinion of the Court of Appeals of Georgia affirming the action of the Trial Court in its supplementary instructions to the jury as they appear set out in ground No. 26, of the motion for new trial which was overruled in the Court below, which ground appears set out in extenso in the Record pages 262-263, as follows:

"Foreman: The question arises among us as to the indictment being placed in evidence for consideration, with the understanding that we were to leave out the last part—that the defendant had a pardon. Some have requested that it be shown if that is true."

"The Court: I have instructed you fully on the question of guilt or innocence—you should not consider or give any note whatever to the alleged conviction in Bibb County in 1935. You will determine the question of guilt or innocence without reference to that. There is no evidence in this case of a pardon, and I instruct you to disregard that matter altogether in determining the issues in this case."

"Foreman: The defendant stated that there was a pardon."

"The Court: I told you there was no evidence in the case of a pardon. You have the right to consider the defendant's statement under the circumstances that I have previously outlined to you. I will reiterate my statement not to consider that indictment

on the question of guilt or innocence, and I instruct you that if you find a verdict of guilty in this case that it would be your duty to fix the penalty at twenty to twenty years" (Record page 200).

It is obvious that this instruction denied to the defendant the right to have the Jury determine the truth of that allegation in the indictment reading as follows:

"and the said accused prisoner prior to committing the above charged crime, had been convicted of the offense of Burglary, a felony, having been convicted by a jury in Bibb County Superior Court on indictment No. 2249, and sentenced to confinement and labor in the penitentiary on May 8, 1945" (Record page 5).

The foregoing instructions by the Court to the Jury in response to an inquiry by the Foreman, amounted to:

(a) A directed verdict, upon the issue of fact presented by the foregoing allegation in the indictment without hypothesis upon the Jury believing the evidence presented by the State.

(b) A denial to the defendant of the right to have the jury pass upon the credibility of his statement made to the jury, which said statement was as follows:

"I would like to say that on the 8th day of May 1935, I was convicted of a crime in Macon, Georgia, and in February 1939, another man confessed to that crime and exonerated me from any part in it. That investigation was made by the trial Judge Hon. W. A. McClellan, by the Chief of Police at Macon, Mr. Ben E. Watkins, and by the Solicitor General of the Macon District, Mr. Garrett, and was also investigated by Mr. Boykin's office of this County by Mr. Perryman, and I have since that time received a pardon from the State of Georgia for that crime. The man who confessed to that crime was Louis Head" (Record page 153).

(c) A peremptory instruction directing the jury as to the punishment to be imposed upon the defendant depriving this defendant of the right to have the jury fix his punishment.

POINT I.

Petitioner had a right to have a jury trial upon each issue of fact presented by an indictment charging him with a felony vested in him by the Constitution of the State of Georgia, the Statutes of the State of Georgia, and the applicable decisions of the Courts of last resort in Georgia.

Constitution of the State of Georgia, Article VI, Section XVIII, par. 1 (Code of Ga.), Sec. 2-4501;

Article I, par. V, Bill of Rights, Constitution of the State of Georgia (Code of Ga.), Sec. 2105;

Hines v. State, 26 Ga. 614 (1);

Winston v. State, 186 Ga. 573, 576, 198 S. E. 667;

Berry v. State, 51 Ga. App. 442, 180 S. E. 635.

"In all Criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State wherein the crime shall have been committed, which district shall have previously been ascertained by law and be informed of the nature and cause of the accusation."—Art. VI (Code of Ga. 1809), Constitution of Georgia.

"The right of trial by jury, except where it is otherwise provided in this Constitution, shall remain inviolate."—Article VI, section XVIII, Par. 1, Constitution of Georgia (Code of Georgia 2-5401).

Speaking of an identical allegation in an indictment, the Supreme Court of Georgia long before the Civil War declared that:

"this was an allegation for the jury and not the Court."—Hines v. State, 26 Ga. 614 (1).

In recent decisions rendered by the Supreme Court of Georgia it has been said:

> "while the jury could have imposed the maximum penalty or recommended mercy without reference to any allegation or proof of any finding as to a former conviction, it is nonetheless true that, when such a former offense and conviction were alleged in the indictment it was **for the jury and not for the Court to determine.**" (Emphasis supplied.)
>
> **Winston v. State**, 186 Ga. 573, 576.

And again in the year of 1935, the Court of Appeals of Georgia had an analogous question before it in the case of Berry v. State, 180 S. E. 635, the defendant in the Court below, seeking to avoid the great prejudice to a fair and impartial consideration of the question of his guilt or innocence of the substantive offense for which he was then being tried, made a motion to the trial Court in which he admitted that he had suffered the former conviction alleged in the indictment and consented and agreed that if the jury should find him guilty of the instant offense for which he was to be put on trial, the Court should fix his punishment at the maximum as provided by the second offender statute. The Trial Court refused to do this and the defendant assigned error on appeal. In refusing this matter the Court of Appeals of Georgia said:

> "It becomes pertinent to inquire whether or not the prior conviction and sentence are relevant or a part of the offense of which the accused is being tried, 'as a general rule, in prosecutions under Statutes authorizing a more severe penalty to be imposed upon a conviction for a second or subsequent offense, the fact of the former conviction is regarded as a part of the description of the offense, and therefore must be alleged in the indictment or information, in order to authorize the infliction thereof' 16 C. J. 1342. There are authorities, however, holding to the contrary rule.

In section 3164 of the same Volume, it is said: 'Where it is necessary to allege and prove the fact of a former conviction in order to authorize the imposition of a more severe penalty upon a subsequent conviction, it has been held that the admission of the prior conviction by a defendant before the selection of a jury, does not relieve the State from the obligation to prove such fact, as there is no authority for a defendant to admit part of the Criminal charge and deny the rest, and therefore it is proper to permit such fact to be proved within the trial.' See in this case, People v. Sickles, 156 N. Y. 541, 51 N. E. 288; State v. O'Neil, 76 Mont. 526, 248 P. 215. This rule seems to apply in Wisconsin, see Howard v. State, 139 Wis. 529, 121 N. W. 133. However, there it appears, that the statute provides that the accused may admit this allegation on the trial. No such exception is made in the Georgia Statute. It appears that from what has been said, that the prior conviction is an element of the second crime so far as the degree of punishment is concerned, and as such our statute authorizes no special plea of guilty as to this feature of the case, though the effect of the charge and proof may be to put the character in evidence. In the Harris and Tribble case, cited supra, the principle invoked for the protection of the defendant in those cases, and it was held that such former conviction must be alleged and proved, and a failure so to do prevented the infliction of the maximum penalty as a matter of law. If the trial Judge, under the indeterminate sentence law, is without authority to exercise his power to act, because of any knowledge which comes to him with reference to a prior conviction, and this right to fix the penalty in felony cases tried before a jury is vested alone in the jury, an admission made to the Court is not an admission made to the jury, and for that reason it was not error to deny the motion of the defendant to exclude proof substantiating this allegation.'' **Berry v. State**, 18 S. E. 635, 638, 639.

The Court also said in the case of Berry v. State, supra:

> "In Harris v. State, 40 Ga. App. 228, 149 S. E. 153, it was held that where a former conviction is not charged in the indictment nor proved by the evidence submitted to the jury, the Court may not fix the punishment at the maximum for the crime charged."

The Supreme Court of Georgia also said in another case:

> "The fact of a former conviction and sentence must be charged in the indictment, where a second conviction would affect the grade of the offense or require the imposition of a different punishment. Where it is necessary to allege a fact in an indictment, it must necessarily be proved." **Tribble v. State**, 168 Ga. 699 (3), 148 S. E. 593-5.

It thus appears that the established judicial procedure of the State of Georgia, the "law of the land", in the State of Georgia, was not adhered to in the trial of this case. This defendant's right under the Constitution of the State of Georgia, and his right under the foregoing decision of the Courts of last resort in the State of Georgia were violated.

It must be observed that we are not here dealing with the question of whether or not the Court below correctly sustained objection to the defendant's offer to introduce in evidence the original documentary pardon and record from the Governor's office supporting said pardon. That ruling of the Court below was made the basis of assignments of error numbered 14 and 15 (Record pages 216-244) although it appears that the Court of Appeals of Georgia considered that foregoing grounds, 14 and 15, presented the same question as that presented by ground 26 (Record page 262).

We direct the attention of the Supreme Court to the fact that the only matter with reference to a pardon which

was before the Court for the purpose of their consideration on ground 26 of the motion for new trial was the foregoing statement made by the defendant.

We respectfully submit that the peremptory instruction of the Court, hereinbefore quoted, substantially denied to this defendant the right to have that statement considered by the jury. It cannot be supposed that the members of the jury were capable of such fine spun distinctions as that sought to be made by the Courts of Georgia between the meaning of the word "evidence" and the effect to be given to a defendant's statement pursuant to that Statute of the State of Georgia which reads as follows:

> "at all Criminal trials, the prisoner shall have the right to make to the Court and jury such statement in the case as he may deem proper in his defense. It shall not be under oath and shall have such force only **as the jury may think right to give it. They may believe it in preference to the sworn testimony in the Case.** The defendant shall not be compelled to answer any question on cross-examination should he think proper to decline to answer." Code of Georgia (1933), section 38-415 (Emphasis supplied).

POINT II.

"Evidence" signifies that which demonstrates, makes clear or ascertains the truth of the very point in issue, either on one side or on the other—Blackstone.

San Antonio Traction Co. v. Higdon, 123 S. W. 732;
Ex parte Lamb Pui, 172 Fed. 456-467;
People v. Bowers, 18 Pac. 660, 665;
Mallory v. Young, 22 S. E. 142, 143, 94 Ga. 804;
Reddington v. Craig, 270 Ill. App. 163;
State v. Heavinger, 143 S. E. 674, 676;
Lynch v. Rosenberger, 249 Pac. 682-683;
Leonard v. State, 127 N. E. 464-466;
Wong Yee Toom v. Stump, 233 F. 194, 198;
Taylor v. McClinton, 112 S. W. 405-414;

Greenleaf on Evidence, 15th Ed. Sec. 1;
Cook v. New Durham, 13 Atl. 650, 651;
1 Benth Jud. Ev. 17;
1 Best. Ev. sec. 11;
Holland v. English S. C. 6, Rich Law, 50, 52;
State v. Danforth, 60 A. 839, 840, 111 Am. St. Rep. 600, 6 Ann. Cas. 557;
O'Brien v. State, 96 N. W. 649.

When the Court below charged the jury:

"I told you there was no evidence in the case of a pardon" (Record page 200)

at a time when the jury appeared to be seriously concerned with the matter presented by the defendant's statement with regard to a pardon, any jury of ordinary laymen could have had no other understanding than that they had been mistaken in their recollection as to what the defendant had said. We respectfully submit that it is directly in the face of any reasonable construction of the Statute permitting the defendant to make a statement which the jury may believe in preference to the sworn statement in the case, to say that such statement is not evidence of the truth of the facts related by the defendant in his statement. It might truly be said that it is not "sworn testimony" but since such statement has the capacity to establish the truth of the existence of the facts to which it relates, it would be a denial of the defendant's right under the Statute to tell the jury that such statement constituted "no evidence" in the case. That was the same as telling the jury that there was nothing in the case from which they could find as a **fact that the defendant had a pardon.**

POINT III.

It is a denial of due process of law for a Court to deprive the defendant of the right vested in him by the Statutes of the State to have his statement, made to the jury pursuant to the Statute, considered by the Jury, and the Court's charge substantially depriving the petitioner of that right in the instant case, constituted an infringement of his rights under the Fourteenth amendment to the Federal Constitution.

Fite v. State, 84 S. E., 16 Ga. Appeal 22;
Williford v. State, 192 S. E. 93;
Felder v. State, 13 S. E. (2nd) 455.

"The privilege accorded a defendant in a criminal trial in this State of making a statement to the jury is an anomaly. The contents of the statement are not to be restricted or governed by the rules controlling the admissibility of evidence. 'In all criminal trials the prisoner shall have the right to make to the court and jury just such statement in the case **as he may deem proper** in his defense.' Penal Code, 1910, 1036. Though the court may prevent repetition of the same statements or debar the statement of circumstances wholly disconnected in fact with the facts upon which the defendant bases his defense, the statement of the defendant is not to be curtailed, either by rulings or interruptions, merely because the facts stated by the defendant, and which constitute a part of his narrative * * * may, under the rules of evidence, be irrelevant and do not present **in law** a valid defense." **Fite v. State**, 84 S. E. 485, 16 Ga. App. 22.

"In view of the foregoing rules as well as for the reason that it is the exclusive prerogative of the jury to give to the statement of one accused of crime such force as they may think right to give it, according it 'preference to the sworn testimony in the case', if the jury thinks right to do so, the court erred in charging the jury that a specified fact brought out by the de-

fendant's statement was not a proper thing for them to consider in making up their verdict." **Fite v. State,** supra.

The Court's charge denied to the jury the right to consider the statement of the defendant that he had been pardoned because the trial Judge presiding at his former conviction, the prosecuting attorney directing the State's case against him in the former prosecution, and the officers of the law who investigated the case made against him in the former trial, had all joined in a statement made to the Governor that another man had confessed and that they felt that the ends of Justice required the defendant in the former trial be pardoned, upon the ground that he was innocent of the offense for which he had been convicted.

Certainly, this statement of the defendant, if believed by the jury, would have rebutted every inference of bad character arising out of the evidence of former conviction. Without evidence of the defendant's bad character as shown by the former conviction for a robbery, we might well understand that the jury were really concerned over the question as to whether or not the evidence in this case was sufficient to justify a conviction of this defendant on the substantive charge contained in this indictment. Recognizing the truth of the declarations of the Supreme Court of Georgia to the effect that proof of the former conviction constitutes a great obstacle to a defendant's defense, for the reason that it also supports an inference of bad character, we earnestly insist that in the instant case the defendant also had the right to show that the Governor of Georgia in the exercise of his constitutional prerogative had pardoned this defendant upon a showing of his innocence. This would have greatly mitigated the effect of the introduction of the indictment and judgment of conviction as evidence of former bad character. We respectfully submit that the Court below invaded this defendant's consti-

tutional rights when it deprived the jury of the right to consider this statement for that purpose.

It will be observed that there is not one word in the defendant's statement about a "conditional pardon" or a "partial pardon." The evidence which tended to show the exact terms of the pardon was not permitted to go to the jury. This point was overlooked by the Court of Appeals of Georgia. Certainly a court cannot justify instructions to a jury by reference to evidence which is not permitted to go to the jury. Certainly the Court's instructions to the jury must be affirmed or reversed upon the basis of evidential matter which is permitted to go to the jury. So it appears that the instruction of the Court below cannot be supported by any process of reasoning based upon the idea of a "partial" or "conditional" pardon since there is nothing in the defendant's statement supporting an inference that his pardon was "partial" or "conditional." Yet the Court of Appeals of Georgia has sustained the Trial Court below in its instructions to the jury here complained of solely upon the theory that the pardon to which the defendant referred in his statement was "partial" or "conditional." The instruction hereinbefore complained of also denied this defendant the right to a trial by jury upon the issue of credibility of the State's testimony tending to establish his former conviction.

The right to have a trial upon this issue of fact is established beyond all peradventure by the argument hereinbefore presented and authorities cited supporting Point I of this Brief and Argument.

POINT IV.

The allegation of an indictment charging a felony which alleges that it is a second offense, presents an issue of fact which can only be decided by the jury under the Constitution, Statutes and applicable decisions of the Courts of last resort in the State of Georgia.

Constitution of the State of Georgia, Article VI, Sec. XVIII, par. I (Code of Ga.), Sec. 2-4501;
Article I, par. V, Bill of Rights, Constitution of the State of Georgia (Code of Ga.), Sec. 2105;
Hines v. State, 26 Ga. 614 (1);
Winston v. State, 186 Ga. 573, 576, 198 S. E. 667;
Berry v. State, 51 Ga. App. 442, 180 S. E. 635.

In support of this Point we submit the entire argument heretofore presented in support of Point I.

It will be further observed that the instruction by the Court directed the jury to consider only one question, viz.: the question of the defendant's guilt or innocence and in the event the jury should find the defendant guilty peremptorily instructed the jury to fix his punishment at twenty to twenty years. The case of Berry v. State and other cases hereinbefore cited in support of Point I in this Brief and Argument constitute conclusive authority to the effect that it is for the jury, and the jury alone to fix the punishment of a defendant in a Criminal case under the indeterminate sentence law of the State of Georgia. When the Court below denied the jury this right, it denied the jury the right to consider and make a finding of fact as to the truth of the allegation of former conviction in the indictment.

It denied to the jury the right to disbelieve the testimony offered by the State to support the allegation of former convictions in the indictment.

Since the early days of English History when the infamous Lord (Bloody) Jeffreys sought to coerce the jury into returning a verdict finding a member of Parliament named Wilkes, guilty of a criminal libel for publishing the reports of secret sessions of Parliament, it has been an established fundamental of common law that a Court could not give a peremptory instruction not hypothesized upon the jury's belief of the evidence directing a jury to return a verdict of guilty in a Criminal case.

We understand that the Federal Constitution does not guarantee a defendant in a State Court a trial by Jury.

But the Fourteenth Amendment guaranteeing that no State shall deprive a defendant of his liberty without "due process of law" does guarantee a defendant a trial in a State Court in accordance with the "law of the land" fixing established procedures.

The Constitution of Georgia has guaranteed to this defendant the right of a trial by jury. The indeterminate sentence law of the State of Georgia provides that the jury, and the jury alone, must pass upon all issues of fact and fix the punishment in felonies of this sort. Berry v. State, supra. The Court's instruction of which we here complain, denied this petitioner the benefit of the judicial procedures established by the Constitution and Statutes of the State of Georgia in that it denied him the right of a jury trial upon the issues hereinbefore discussed.

We respectfully submit that in this respect this defendant was denied due process of law pursuant to the guarantee of that clause in the Fourteenth Amendment to the Federal Constitution.

SECOND ASSIGNMENT OF ERROR.

"B. The defendant on trial for a felony was denied the right to have the credibility of his statement to the jury submitted to the jury contrary to established judicial procedure in the State of Georgia guaranteed to defendants on trial in Criminal cases by the Statute of the State of Georgia and the judicial decisions of the Courts of last resort in the State of Georgia."

In support of this assignment of error we present the points of law and authorities cited in support thereof hereinbefore presented in support of the first assignment of error.

THIRD ASSIGNMENT OF ERROR.

"C. The defendant on trial for a felony was denied the right to have the credibility of the evidence against him with regard to a former conviction alleged in the indictment submitted to the jury, contrary to established judicial procedure in the State of Georgia guaranteed to defendants on trial by the Statutes of the State of Georgia and judicial decisions of the Courts of last resort of the State of Georgia."

In suport of this asignment of error we present the same argument, points of law, and authorities cited in support thereof, which we have presented in support of the First assignment of error.

FOURTH ASSIGNMENT OF ERROR.

"D. The defendant on trial for a felony was denied the right to have the benefit of a vested right conferred upon him by a pardon duly issued by the Governor of the State of Georgia removing disabilities of a former conviction by a ruling of

> the Court denying him the privilege of introducing said pardon in evidence and thereby deprived of his life, liberty or property contrary to the guarantees contained in the due process clause of the Fourteenth amendment."

This Fourth assignment of error is predicated separately and severally, upon grounds numbered Fourteen and Fifteen in the motion for new trial filed in the Court below (Record pages 223-244). These grounds of the motion for new trial each relating to the action of the trial Court below in sustaining State's objection to the defendant's offer to introduce in evidence the pardon and the record in the Governor's office supporting said pardon and establishing defendant's innocence (Record pages 223-229; 237-244). It is contended that the defendant had the right to introduce this testimony (a) to rebut the inference of bad character which the introduction of the indictment and conviction (State's exhibit #4 Record pages 181-184) created against him and (b) to absolve this defendant from the disability resulting from a former conviction.

We think this will appear obvious to any Court which will read the pardon (Record page 24) and the letter of Charles H. Garrett, Solicitor General of the Bibb County Superior Court (Record pages 225-227), concurred in by Judge W. A. McClellan (Record page 227) and the full and complete detailed confession of Louis Head (Record pages 228-229) all of which were offered in evidence by the defendant as will appear from the proceedings in the Court below as follows:

> "I did not mean that I would go into a retrial of the previous case, but open up evidence to see whether the pardon was based on an investigation. Our idea is that the pardon was granted by the Governor on the idea that he was innocent—those records could come in, but we could go to a dangerous length

> if we started out to try the case over. I think only the record is admissible, and this would be a question whether it was granted on the ground of innocence or from a standpoint of mercy" (Record pages 235-236).

and again:

"We think that the record of the Governor's office should go along with the conviction" (Record page 236).

We think that consideration of all this matter offered to be introduced will convince any Court that its effect would have been to completely destroy any inference of bad character which the jury must have gained from the introduction of the indictment and judgment of conviction. We think it would have had great persuasive effect in illustrating to the jury the danger of convicting a man upon weak and inconclusive evidence as to his identity as was the case here.

We direct the attention of the Supreme Court of the United States that the Solicitor General of the Bibb County Superior Court was ready to confess an extraordinary motion for new trial, a practice in the State of Georgia which enables a defendant to get a new trial upon newly discovered evidence, no matter how great a time has intervened since his conviction, but, that in the interests of practicality and doubtless of the opinion the pardon would be as efficacious to remove all disabilities arising from the conviction as a judgment of innocence upon an extraordinary motion for new trial and in the interest of speedy release of a victim of the judicial machinery of Georgia, recommended the pardon.

> "Of course, the matter might be reached by an extraordinary motion for new trial but the Court would be bound in the interest of what is considered Justice to waive such technical requirements because of the fact that such motion might set a troublesome precedent" (Record page 227).

In these facts the Trial Judge presiding over the Bibb County Superior Court fully concurred:

> "I fully concur in the views of the Solicitor General as set out above. After a careful and exhaustive investigation of the Randall case personally, I am convinced that the ends of Justice demand that he be pardoned.
>
> "With great respect, I am
>
> Yours sincerely,
> Judge W. A. McClellan, J.S.C.M.C."
>
> (Record page 227.)

And again the affidavit of Louis Head (Record pages 228-229) confessing his guilt and the fact that he appeared in Open Court, entered his plea of guilty to the same offense for which Randall had been convicted and accepted a sentence of five years;

> "accumulative to the ten to twenty years he is now serving."—Garrett's letter (Record page 226).

It appears to us to be a tragedy that this petitioner relying upon Judge McClellan and Solicitor Gen. Garrett, who, acting in the utmost of good faith, sought to remove all the stain of the prior conviction, should here be denied the right to show the record in the Governor's office of his pardon and the evidence upon which the Governor acted in issuing the pardon, to avoid being penalized a second time for a crime of which he was innocent according to the trial Judge and prosecuting attorney, and the confession of the guilty person.

He served more than three years in the State penitentiary of Georgia for a crime which he never committed. The Governor, the trial Judge, and the prosecuting Solicitor could not restore the more than three years lost from his life as a result of that tragic mistake. The Judge and the trial Solicitor could have reopened his case by an extraordi-

nary motion for new trial and could then have nol prossed the indictment and thereby obliterated the judgment of conviction. They evidently were of the opinion that a pardon would obtain the same result. So was the Governor. In the interests of practicality they sought the easiest way.

The poor victim of the former miscarriage of justice resulting in his former conviction, is sought to be penalized again upon mere technicalities resulting from the praiseworthy efforts of the Trial Judge and Solicitor General to avoid all technical requirements of the Courts and the details incident thereto, and secure speedy vindication of this petitioner by obtaining the Governor's pardon. And we now have the spectacle of this petitioner haled again into Courts upon weak and inconclusive and unreliable testimony as to his identity, penalized by being subjected to a higher penalty of twenty years in the penitentiary because of a conviction for which he had received a pardon from the State of Georgia based upon his innocence of the crime for which he suffered the former conviction, and burdened by the evidence of a former conviction in his defense.

It occurs to us, that, without regard to technical niceties, such procedure amounts to double punishment of an innocent man for a crime of which he was found to be innocent. Surely, such procedure could not be tolerated as a compliance with the requirements of the due process clause of the Fourteenth amendment to the Federal Constitution.

POINT V.

Where a conditional pardon is susceptible of more than one interpretation, it must be construed most favorably to the grantee.

Osborne v. U. S., 91 U. S. 474, 23 L. Ed. 388;
Lee v. Murphy, 22 Gratt (Va.) 389;
Muckle v. Clark, 191 Ga. 202, 12 S. E. 339.

"The object of the courts in construing instruments of this character is to carry out the intention of the parties; and wherever that is doubtful, the grant is interpreted most beneficially to the citizen or subject, and most strongly against the King. This is an universal rule in the interpretation of pardons.—First Bishop Criminal Law, Section 757, and cases cited."—

Lee v. Murphy, 22 Gratt (Va.) 789.

POINT VI.

An instrument of pardon, validly delivered and accepted, is such a grant that the recipient has a vested right and title to its privileges and immunities which cannot be impaired except by due process of law.

U. S. v. Wilson, 7 Peter (U. S.) 150, 8 L. Ed. 640;
State v. Smith, 17 S. C. (1 Bail.) 283, 19 Am. Dec. 679;
Lee v. Murphy, 22 Gratt (Va.) 789, 12 Am. Rep. 563;
Trustees of Dartmouth College v. Woodward, 4 L. Ed. 629.

"A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him."—

U. S. v. Wilson, 7 Peter (U. S.) 150, 8 L. Ed. 640.

The Dartmouth College Cases are authority for the proposition that a grant by the executive to a citizen creates a vested right which may not constitutionally be impaired or divested except in strict accordance with the terms of the grant. Of course, the courts were there dealing with a charter to a college. We are here dealing with a charter to liberty, but the same principle applies.

State v. Smith, 178 S. C. (1 Bail.) 283, 19 Amer. Dec. 679, is authority to the effect that a pardon and conditions contained in a pardon are to be construed according to the same principles of construction which the courts apply to deeds and contracts, and that a pardon vests the recipient thereof with a vested right to his liberty, subject to the terms of the pardon, and may not be revoked, without violation of due process of law, except in strict accordance with its terms.

POINT VII.

The revocation of a conditional pardon for breach of condition without affording an opportunity to be heard upon the question whether the condition has been violated amounts to a denial of due process of law.

Fleenor v. Hammond, 116 Fed. (2d) 982, 132 A. L. R. 1231.

We direct the attention of the Court to the case of Fleenor v. Hammond, 116 Fed. (2d) 982. Lee Fleenor had been convicted and sentenced to serve a term of fifteen years in the State Reformatory of Kentucky. On December 4, 1934, the Governor of Kentucky granted to him a pardon upon conditions recited in the face of the pardon, reserving to the Governor of Kentucky the right by an executive order to revoke, or terminate, said pardon for breach of the condition requiring them "to conduct themselves as useful, upright, and law-abiding citizens." Without a hearing upon the question of breach of said condition the Governor of Kentucky revoked said pardon and ordered Fleenor arrested and returned to the reformatory to serve the remainder of his sentence. This order was made and entered without notice to the petitioner and without an opportunity afforded him to be heard. He filed his petition for writ of habeas corpus in the

United States District Court for the Western District of Kentucky, and his petition was there dismissed, and he appealed to the Circuit Court of Appeals for the Sixth Circuit, in which court a judgment and opinion was rendered by Simons, Circuit Judge, concurred in by Hickson and Hamilton, Circuit Judges, on January 13, 1941, reversing the decision of the District Court of the United States and remanding the cause with instructions. In that case it was said:

> "The Fourteenth Amendment provides, inter alia, 'nor shall any State deprive any person of life, liberty, or property, without due process of law * * *.' This governs any action of a state 'whether through its legislature, through its courts, or through its executive or administrative officers.' Monney v. Holohan, 294 U. S. 103, 113, 55 S. Ct. 340, 342, 79 L. Ed. 791, 98 A. L. R. 406; Carter v. Texas, 177 U. S. 442, 447, 20 St. Ct. 687, 44 L. Ed. 839; Rogers v. Alabama, 192 U. S. 226, 231, 24 S. Ct. 257, 48 L. Ed. 417; Chicago, Burlington & Quincy R. v. Chicago, 166 U. S. 226, 233, 234, 17 S. Ct. 581, 41 L. Ed. 979. The most recent application of this principle is made in Smith v. Texas, 61 S. Ct. 164, 85 L. Ed. ..., November 25, 1940. While the phrase 'due process of law' has never been precisely defined and perhaps is incapable of such definition, the concept is within limits capable of being fully grasped by the judicial and professional mind. It has frequently been construed as synonymous with the phrase 'according to the law of the land.' Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55, 64, 77 L. Ed. 158, 84 L. Ed. 527, notes the general acceptance of Webster's classic commentary upon it as 'a law which hears before it condemns.' More recently it was said, Brown v. Mississippi, 297 U. S. 278, 56 S. Ct. 461, 465, 80 L. Ed. 682, that the due process clause requires 'that state action, whether through one agency or another shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'

"Neither diligence of counsel nor that of the court has disclosed any federal case which holds that the revocation of a conditional pardon may arbitrarily be made without violating the essentials of due process. State courts have condemned such arbitrary exercise of power in the absence of or notwithstanding express reservation. People v. Moore, 62 Mich. 496, 29 N. W. 80; State v. Horne, 52 Fla. 125, 42 So. 388, 7 L. R. A. N. S. 719; Ex parte Davenport, 7 S. W. 2d, supra; State ex rel, O'Conner v. Wolfer, 53 Minn. 135, 54 N. W. 1065, 19 L. R. A. 783, 39 Am. St. Rep. 582, though it has been held in a number of cases that if the conditional pardon reserves the right to the Governor to revoke it for cause, his judgment thereon is conclusive and the prisoner is not entitled to a hearing. Arthus v. Craig, 48 Iowa 264, 30 Am. St. Rep. 395; Ex parte Fraizer, 91 Tex. Cr. R. 475, 239 S. W. 972; Spencer v. Kees, 47 Wash. 276, 91 P. 962; Ex parte Houghton, 49 Or. 232, 89 P. 801, 9 L. R. A. N. S., 737, 13 An. Cas. 1101."

POINT VIII.

The established procedure for revocation of a pardon for breach of condition subsequent, is for a court of competent jurisdiction, upon having it's attention called by affidavit, habeas Corpus, or otherwise, that the grantee has breached the condition, to issue a rule or order reciting the original judgment of conviction and sentence, the pardon and its condition, and the alleged violation of or non-compliance with the conditions thereof, and causing the grantee to be arrested and brought before the court and show cause, if any he has, why the original sentence should not be executed.

Fleenor v. Hammond, 116 Fed (2d) 982, 132 A. L. R. 1231;

Ex Parte Davenport, 110 Tex. Cr. R. 326; 7 S. W. (2d) 589, 60 A. L. R. 1403;

Alverez v. State, 50 Fla. 24, 39 South. 481, 11 Am. St. Rep. 102, 7 Ann. Cas. 88;

Commonwealth ex rel. Meredith v. Hall, 277 Ky. 612, 126 S. W. (2d) 1056;
State ex rel. O'Conner v. Wolfer, 53 Minn. 135, 54 N. W. 1065, 19 L. R. A. 783, 39 Am. St. Rep. 582;
Ex parte Davenport, 110 Tex. Cir. R. 326, 7 S. W. (2d) 589, 10 A. L. R. 1043, 54 A. L. R. 1474, 132 A. L. R. 1254, 60 A. L. R. 1420.

POINT IX.

The executive, having the Constitutional power to grant a pardon and having the right to impose any condition or limitation thereupon, has the right to provide in the instrument of pardon that same shall be revocable at his pleasure; when such a limitation upon the power to revoke for breach of condition is contained in the face of the pardon, which pardon is accepted by the grantee, such limitations upon the power of revocation restrict the power of revocation to the Governor, since no court, or other official, may exercise his pleasure.

39 Am. Juris. 561-564, Sections 67, 68, 69, 70 and 71;
See also, cases cited in notes to Sections 67, 68, 69, 70 and 71, pp. 561-564, Amer. Jurisp.

POINT X.

A pardon delivered upon a condition subsequent takes effect absolutely as soon as it is delivered and accepted, subject to defeasance by breach of the conditions subsequently duly ascertained by due process of law, subject to the limitations upon the forfeiture prescribed by the terms of the instrument granting the pardon.

Ex Parte Well, 18 Howard (U. S.) 307, 15 L. Ed. 421;
Fuller v. State, 122 Ala. 32, 26 South. 146, 45 L. R. A. 502, 82 Am. St. Rep. 17;
Ex Parte Hawkins, 61 Ark. 321, 32 S. W. 106, 30 L. R. A. 736, 54 Am. St. Rep. 209;

State v. Horn, 52 Fla. 125-143, 42 South. 388-714, 7 L. R. A. (N. S.) 719;
Alverez v. State, 50 Fla. 24, 39 South. 481, 111 Am. St. Rep. 102, 7 Ann. Cas. 88;
Re: Williams, 149 N. C. 436, 63 S. E. 108, 22 L. R. A. (N. S.) 238;
Ex Parte Houghton, 49 Ore. 232, 89 Pac. 801, 9 L. R. A. (N. S.) 737, 13 Ann. Cas. 1101.

POINT XI.

A pardon obliterates the charged offense and restores the alleged defendant to the status occupied by him prior to the judgment of conviction so far as it is within the power of human institutions so to reinstate him.

Ex Parte Garland, 18 L. Ed. 366;
Osborne v. U. S., 23 L. Ed. 388;
Norris v. Hartsfield, 186 Ga. 171, 197 S. E. 251;
Edwards v. Commonwealth, 78 Va. 39, 49 A. Rep. 377;
Scrivener v. Texas, 20 S. W. (2d) 416;
Sanders v. State of Texas, 1 S. W. (2d) 901;
Kelly v. State of Indiana, 185 N. W. 453;
State v. Martin, 59 Ohio St. 212, 52 N. E. 188, 69 Am. St. Rep. 762, 43 L. R. A. 94;
Tucker v. State, 14 Okla. 54, 167 Pac. 637;
State v. Lee, 177 La. 74, 132 South. 219;
Diehl v. Rogers, 114 Tenn. 646, 88 S. W. 941;
Fite v. State, 114 Tenn. 646, 88 S. W. 941;
In re Convicts, 73 Vt. 414, 1st Bishop Cr. Law, sec. 919, 20 R. C. L. (pars. 40, 41, p. 556);
U. S. v. Athens Armory, 35 Ga. 344-362.

POINT XII.

The language used in an instrument of pardon is to be construed most favorably in favor of the grantee, and the limitations upon its operations should be strictly construed.

Re: Charles, 115 Kan. 323, 222 Pac. 606;
Alfred v. Hines, 189 Ky. 203, 224 S. W. 752;

Crook v. Sanders, 123 S. C. 28, 115 S. E. 760, 28 A. L. R. 940;
Lee v. Murphy, 22 Gratt (Va.) 789, 12 Am. Rep. 563;
Osborne v. U. S., 91 U. S. 474, 23 L. Ed. 388;
Boyd v. U. S., 142 U. S. 450, 35 L. Ed. 1077, 12 S. Ct. 292;
Muckle v. Clark, 191 Ga. 202, 12 S. E. 339.

It will be observed that in the case of Muckle v. Clark, 12 S. E. 339, the Governor of Georgia had exercised his pleasure and had revoked the pardon there under consideration, and the case there being reviewed was a petition for habeas corpus by the pardoned man, filed by him after his arrest and commitment to serve the sentence. The petitioner in habeas corpus, Muckle, insisted that he had not forfeited his pardon, for the reason that the Governor's determination was arbitrary. In that case, Justice Bell, speaking for the court, said: "On the first question, while it may be true that if a conditional pardon is susceptible of more than one interpretation, it should be construed most favorably to the grantee," and then went on to hold that the language of the pardon there considered would admit of no reasonable interpretation other than that the Governor reserved the power to revoke the pardon.

FIFTH ASSIGNMENT OF ERROR.

> "E. The defendant on trial for a felony, being charged as a second offender, was denied the right to introduce in evidence a pardon which legally absolved him from all disabilities resulting from the former conviction alleged in the indictment and subjected to the disability imposed upon second offenders by a Statute of the law of Georgia contrary to due process of law."

The Court of Appeals of Georgia,—in upholding the action of the trial Court denied to this petitioner the right to introduce his pardon in evidence, saith:

> "When the defendant again violated the law and the verdict of guilty in the present case was a judicial determination that he had done so, such violation was the transpiring of an event which made the conditional pardon inoperative or void"—Opinion of the Court of Appeals of Georgia" (Record page 295).

The terms of the pardon specifically provide that its revocation shall be contingent. It is neither "partial" nor "void." It is a pardon to be terminated upon a condition subsequent in the pleasure of the State of Georgia, according to its own terms, which are:

> "Should Joel O. Randall violate the terms of this conditional pardon, same shall be revocable at the pleasure of the Governor" (Record page 238).

It must be borne in mind that at the time this petitioner offered this pardon in evidence the Jury trying the instant case had not determined his guilt or innocence upon the charge embraced in the indictment, so a termination of the benefits of this pardon at the time it was offered in evidence cannot be predicated upon the verdict of a jury later returned into the Court. The Trial Judge could not then anticipate what the verdict of the jury would be. The Trial Judge could not speculate upon the result of the jury verdict and rule upon offers of evidence to meet a supposed prophecy of the jury's findings. Indeed, petitioner here is serious in his belief that the Court's action in denying him the privilege of introducing his pardon contributed greatly to the result of the jury's deliberation, by denying him the benefit of this evidence to rebut the strong inference of bad character which the introduction of the indictment and judgment of conviction had generated.

To illustrate the fallacy of the argument of the Court of Appeals, let it be supposed that the jury had returned

a verdict of Not Guilty in the instant case. In that event, the ruling of the trial Court sustaining the State's objection to the introduction of the pardon would have been error. But this petitioner would have had no benefit from that error.

Students of law are often very much confused and oftentimes misled by the looseness with which writers and legal speakers employ the terms "void," "voidable" and "terminated." We respectfully submit that the instrument offered in evidence (Record page 238) was never **void** and was never **voidable.** Although it was subject to be "terminated" upon the happening of two events, (a) violation of the law by Randall; (b) the exercise of the pleasure of the Governor by ordering a revocation.

We respectfully submit that the Governor of Georgia having reserved the right in the pardon to revoke same at his pleasure, the pardon could only be revoked in strict accordance with its terms. **It was terminable at the will and pleasure of the Governor.** It was not terminable at the will and pleasure of any trial Judge of any Court in Georgia, nor indeed, even at the will and pleasure of the Court of Appeals of Georgia. The action of the courts below denying to this defendant the immunity from disability resulting from a former conviction conferred by this pardon constituted an infringement of this petitioner's right not to be deprived of his life, liberty or property except by due process of law, guaranteed to him by the Fourteenth Amendment to the Federal Constitution— This Brief and Argument, Point VII.

Not even the Governor of Georgia could have revoked this pardon in the arbitrary exercise of his pleasure without giving this defendant an opportunity to be heard upon a charge directly involving this defendant's breach of the conditions to the effect that he could not violate the law. The case of Fleenor v. Hammond, supra, is clear and

unequivocal authority to the effect that a pardon such as that here considered may not arbitrarily be revoked without infringing upon the grantee's rights under the due process clause of the Fourteenth Amendment to the Federal Constitution.

SIXTH ASSIGNMENT OF ERROR.

> "F. The Court of Appeals of Georgia has rendered a decision adjudicating a revocation of a pardon duly issued by the Governor of the State of Georgia without this petitioner having been granted the right to a hearing thereupon, thereby subjecting him to the necessity of serving a sentence in the Georgia penitentiary for which he had been pardoned by the Governor of the State of Georgia, depriving him of his liberty contrary to the due process clause of the Fourteenth amendment."

The Court of Appeals of Georgia in its decision here sought to be reviewed, has judicially determined that the pardon issued to this petitioner by the Governor of Georgia (Record page 238) automatically became "void and inoperative";

> "when the defendant again violated the law" (Record page 295).

The result of this judicial determination, if allowed to stand, subjects this petitioner to the imperative necessity of serving the sentence of imprisonment upon the judgment and conviction rendered by the Bibb County Superior Court for which he was granted this pardon. This without any hearing upon the question as to whether or not his pardon should be revoked. He is thereby subjected to a **punishment** from which this pardon absolved him. To undergo this punishment he will be deprived of his liberty

for a long period of time. We have hereinbefore argued the questions of law which this ruling presents and we submit that argument, particularly the argument in support of the Fourth assignment of error and Fifth assignment of error in support of this assignment of error. We respectfully submit that the action of the Court of Appeals of Georgia in treating this pardon as null, void and inoperative is arbitrary and contrary to the express terms of the pardon. To permit this result to be achieved in the trial of the defendant on a charge of having robbed the Paramount theatre would permit this defendant to be subjected to two different punishments as the result of one jury verdict in one case. He would receive the maximum punishment permitted by law for the robbery of the Paramount theatre and, in addition thereto, by reason of the verdict of the jury would be required to serve whatever portion of his former sentence the pardon had absolved him from serving.

Who can say that the Governor of Georgia viewing the entire record in this case would exercise his pleasure by adding the old sentence on the old conviction to the maximum sentence of twenty years on this conviction? We think we have hereinbefore demonstrated that where the constitution vests in the Governor unlimited power to pardon, the Governor may impose such conditions or limitations as he sees fit. In this case he imposed a conditional limitation on a condition subsequent. He reserved to himself and to himself alone, the right to terminate this pardon upon the happening of said events named by himself in the pardon. We respectfully submit that it would be a violation of this defendant's right to have due process of law to permit any Governmental authority except the Governor of the State of Georgia to exercise the constitutional prerogatives of the Governor's office.—Point IX of this Brief and Argument.

Where the Governor reserved to himself a right of

election, we respectfully submit the Courts have no power to exercise that election for him. This is what the Court of Appeals of Georgia has said that the Trial Court did when it refused to permit this defendant to introduce his pardon in evidence.

This is what the Court of Appeals has done when it rendered its judicial determination last hereinbefore quoted to the effect that the pardon automatically became void upon the defendant's violation of a law.

CONCLUSION.

This petitioner has in the utmost good faith presented his Brief and Argument in support of his petition.

It is most earnestly and seriously considered that this petitioner has for a second time in his lifetime been subjected to a tragic miscarriage of justice, suffering for a second time a conviction for a crime which he did not commit.

The pardon and the record from the Governor's office supporting the pardon, conclusively demonstrate his innocence of the charge unon which he was first convicted.

This petitioner most earnestly insists that a mere reading of the entire record in this case will demonstrate to any fair minded reasonable thinking person that the substantial evidence in this case is so weak and inconclusive that a verdict of conviction would have never been obtained in a trial conducted strictly in accord with the rules of law and evidence which constitute the "law of the land" in the State of Georgia.

The witnesses who attempted to identify this defendant as the alleged robber were not positive in their identification and opportunity to observe the robber was so limited

that they could not have formed a definite impression of his characteristics sufficient to enable them to identify this defendant as the robber; they could see no part of the robber's person except his eyes; and his hands; and opportunity of observation was limited to a few seconds; they admit that they got together and pieced out their recollections; one witness supplied one characteristic and another another, until they created a composite description upon which they could all agree; they admit that they tentatively identified two different persons other than this defendant before they identified this defendant. Voluminous testimony was permitted to go to the jury with regard to one Berry who was not shown to have been in the City of Atlanta about or at the time of the alleged robbery and who was not shown to have had any communication, direct or indirect, with this defendant at any time before the alleged robbery nor within seven days after the robbery; who was not shown to have had any connection with the robbery, or any of the spoils. The Theatrics and dramatics of the prosecuting attorney, coupled with the erroneous rulings of the Court below here complained of, contrived to inflame and prejudice the minds of the jury to the point that they ignored a most convincing and complete alibi from disinterested witnesses who had been thoroughly and completely investigated by a representative of the prosecution and without disclosing the slightest blemish upon their character.

This petitioner now appeals to the Supreme Court of the United States for protection against the second tragedy which has come into his life, namely punishment by imprisonment in the penitentiary for a crime which he did not commit. He earnestly insists that had his constitutional right to have a jury trial upon all the issues involved

in his case and his constitutional rights to be heard in his own defense, not been ignored by the rulings of the trial Court, he would have received a verdict in his favor.

Respectfully submitted,

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